

*Model Rules***Georgia Opts for Highly Selective Approach
In Choosing Model Rule Updates to Borrow**

Georgia lawyers must now obtain informed consent in writing for valid waivers of most conflicts of interest, as part of a group of updates to the state's professional conduct standards.

The amendments update the black-letter text or comments for about two dozen Georgia Rules of Professional Conduct. The changes became effective upon their adoption Nov. 3. Highlights of the amended rules:

- Corporate counsel now have an obligation to report insiders' wrongdoing up the ladder and may disclose the misconduct to outsiders in limited circumstances.

- Lawyers are forbidden to charge "unreasonable or excessive" fees or expenses, whereas the previous rule called for a lawyer's fee to be reasonable.

- Managers in a law firm now have affirmative obligations to make sure that lawyers and nonlawyers in the firm act ethically.

William P. Smith, the Georgia State Bar's ethics counsel, told Bloomberg BNA that the bar came up with the recommended amendments through a committee process. After being aired for public comment and reviewed by the board of governors, the bar's proposals were presented to the Georgia Supreme Court.

"The motivation was an attempt to pull our rules more in line with the Model Rules," Smith said.

However, the amendments reflect a highly selective approach to incorporating the updates made to the ABA Model Rules over the past decade. Only a few of the amended rules wholly follow the ABA models, and Georgia did not embrace many of the ABA's newest standards. Furthermore, the state retained many of its provisions that diverge from the ABA standards, and added text and commentary not drawn from the ABA model.

Smith said that he would not expect any other major revisions to Georgia's lawyer conduct rules until the ABA Commission on Ethics 20/20 makes its recommendations for updating the Model Rules.

Shift to 'Informed Consent.' Throughout the rules, the Georgia amendments substitute the concept of "informed consent" for "consent after consultation."

For most Georgia lawyers, this shift is probably the biggest deal in the amendments, Peter Werdesheim told Bloomberg BNA. Werdesheim represents lawyers in malpractice and disciplinary matters as part of his practice with Carlock Copeland & Stair, Atlanta, although he was not involved in the rule updating process.

As in the Model Rules, the state's requirements for documenting informed consent differ from rule to rule. Some provisions require "informed consent" only, such as the rule on limiting the scope of a representation (Rule 1.2(c)). Others require informed consent to be confirmed in writing, as in the general rule on conflicts of interest (Rule 1.7) and the rules on former-client conflicts (Rule 1.9), successive government and private employment (Rule 1.11), and former judges or arbitrators (Rule 1.12).

Still other rules require informed consent in a writing signed by the client, included the rule on lawyer-client business deals (Rule 1.8(a)) and the rule on aggregate settlements (Rule 1.8(g)).

The revised terminology rule defines the terms "informed consent" (Rule 1.0(h)) and "confirmed in writing" (Rule 1.0(b)).

Conflicts Rules. The amendments largely omit most of the other recent changes to the Model Rules dealing with conflicts of interest.

Perhaps most notably, Georgia did not add a screening provision to Rule 1.10 on imputed disqualification, whereas Model Rule 1.10 was amended in 2009 to allow screens when lawyers change firms. See 25 Law. Man. Prof. Conduct 88; 25 Law. Man. Prof. Conduct 418.

Moreover, Georgia did not embrace the ABA Ethics 2000 Commission's overhaul of Rule 1.7.

A revised Comment [7] to Rule 1.7 appears to indicate that joint representation of co-defendants or plaintiffs in litigation generally presents a conflict that cannot be cured by informed consent.

Georgia's amendments omit Model Rule 1.8(j) on sex with clients.

Georgia also left in place Rule 1.8(i) on lawyer relatives (and updated that provision to speak of "informed consent"), whereas the Model Rules provision on lawyer relatives was jettisoned a decade ago as part of the Ethics 2000 Commission's reforms.

No Agreements Restricting Bar Complaints

Rule 9.2 of the Rules and Regulations of the Georgia State Bar, as recently amended, provides:

“RULE 9.2. RESTRICTIONS ON FILING DISCIPLINARY COMPLAINTS

“A lawyer shall not enter into an agreement containing a condition that prohibits or restricts a person from filing a disciplinary complaint, or that requires the person to request dismissal of a pending disciplinary complaint.

“The maximum penalty for a violation of this Rule is disbarment.”

“Comment

“[1] The disciplinary system provides protection to the general public from those lawyers who are not morally fit to practice law. One problem in the past has been the lawyer who settles the civil claim/disciplinary complaint with the injured party on the basis that the injured party not bring a disciplinary complaint or request the dismissal of a pending disciplinary complaint. The lawyer is then free to injure other members of the general public.

“[2] To prevent such abuses, this Rule prohibits a lawyer from entering into any agreement containing a condition which prevents a person from filing or pursuing a disciplinary complaint.”

Selective Endorsement. Georgia did not embrace many of the standards the ABA adopted over the past decade, such as the ABA’s new language on prosecutors’ obligations when they learn of a convicted defendant’s innocence (Model Rule 3.8(g) and (h)); inadvertently sent materials (Model Rule 4.4(b)); short-term limited legal services (Model Rule 6.5); nonexclusive reciprocal referral arrangements with nonlawyer professionals (Model Rule 7.2(b)(4)); and political contributions to obtain government legal engagements or appointments by judges (Model Rule 7.6).

Also omitted from the updated Georgia standards is Model Rule 1.18, which addresses a lawyer’s duties to prospective clients. However, this subject is covered briefly in a new comment [4A] to Georgia’s Rule 1.6, which defines the information protected by that rule to include “information gained from a person (prospective client) who discusses the possibility of forming a client-lawyer relationship with respect to a matter.”

The new comment states that even when no client-lawyer relationship is formed, “the restrictions and exceptions of these Rules as to use or revelation of the information apply, e.g., Rules 1.9 and 1.10.”

Georgia did not incorporate the ABA’s 2002 updates beefing up the duty of candor toward tribunals in Model Rule 3.3, such as the duty to take remedial action upon learning of a crime or fraud in an adjudicative proceeding. The amendments substantially change the comments to Georgia’s Rule 3.3, however.

The amendments leave many rules untouched, such as those addressing public service and lawyer advertising, as well as most of the standards on lawyers’ role as advocates.

Some ABA Models Embraced. Amended Rule 1.4, which follows the ABA model on lawyer-client communication, goes into more detail than the previous Georgia rule on what a lawyer must tell a client during the representation.

Rule 1.6 on lawyer-client confidentiality tracks Model Rule 1.6 in permitting disclosure of otherwise protected information to secure legal advice about the lawyer’s compliance with professional conduct rules. The remaining text of Georgia’s unique standard on lawyer-client confidentiality was not amended except by changing “consent after consultation” to “informed consent.”

Georgia’s revised rule on representing organizations follows the updated version of Model Rule 1.13, which imposes heightened duties on corporate counsel who learn of internal wrongdoing and permits lawyers to disclose misconduct outside the corporate client in some circumstances.

Revised Rule 1.14 tracks the ABA standard on representing clients with diminished capacity, authorizing a lawyer to take “reasonably necessary protective action” under limited circumstances.

Georgia followed the ABA’s lead in deleting Rule 2.2 (lawyers as intermediaries) and enacting a rule on serving as third-party neutrals (Model Rule 2.4). Georgia’s version of Rule 2.4 includes an additional paragraph, not found in the ABA model, addressing situations where one of the parties in a mediation is a current or former client of the third-neutral or of that lawyer’s firm.

Rules 5.1 and 5.3 were amended to follow the ABA models, making managers, not just partners, responsible for ensuring that others in the firm conform to the requirements of ethics rules.

Georgia already amended its rules in 2004 to allow lawyers licensed in another state or another nation to provide some legal services in Georgia on a temporary basis. See 20 Law. Man. Prof. Conduct 370.

Other Changes. In a change that tracks the evolution of the ABA model, amended Rule 1.5 prohibits lawyers from charging “an unreasonable fee or an unreasonable amount for expenses,” rather than stating that lawyers may charge a reasonable fee. In addition, the revised rule, like the ABA model, mandates that lawyers notify clients about any changes in the basis or rate of their fee or expenses.

Amendments to Rule 8.4 (misconduct) added several prohibitions drawn from the ABA model. Under the re-

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vised rule, it is misconduct to claim an ability to improperly sway a government official or agency, to assert an ability to achieve results by unethical or improper means, or to gain results by such methods. It is also misconduct to knowingly assist a judge in violating judicial conduct rules or other law.

Also added to Rule 8.4 is a provision making it unethical for a lawyer to commit a criminal act that reflects adversely on the lawyer's fitness or character as a lawyer, where the lawyer has admitted the commission of the act in court.

Other Bar Rules. The amendments change two of Georgia's three standards on safekeeping property, Rules 1.15(I) and 1.15(III).

Also amended were a number of Georgia bar rules beyond the rules governing lawyer conduct. Among these, Werdesheim singled out amended Rule 9.2, which broadly forbids a lawyer to make an agreement that restricts anyone from filing a disciplinary complaint (*see box*). The prohibition in the prior rule only covered settlement agreements in cases involving misuse of trust funds, he said.

BY JOAN C. ROGERS

Full text of amendments at <http://op.bna.com/mopc.nsf/r?Open=jros-8qzlcq>.